

Michigan Law Review

Volume 113 | Issue 1

2014

Protecting Whistleblower Protections in the Dodd-Frank Act

Samuel C. Leifer

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Business Organizations Law Commons](#), [Consumer Protection Law Commons](#), [Labor and Employment Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Samuel C. Leifer, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 MICH. L. REV. 121 (2014).

Available at: <https://repository.law.umich.edu/mlr/vol113/iss1/3>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NOTE

PROTECTING WHISTLEBLOWER PROTECTIONS IN THE DODD–FRANK ACT

Samuel C. Leifer*

In 2008, the United States fell into its worst economic recession in over seventy years. In response, Congress enacted the near-comprehensive Dodd–Frank Wall Street Reform and Consumer Protection Act. Section 922 of Dodd–Frank, in particular, includes specific provisions designed to incentivize and protect corporate whistleblowers. These provisions demonstrated Congress’s belief that a comprehensive and robust whistleblower protection scheme was essential to preventing many of the abuses that caused the financial crisis. Unfortunately, this section’s inconsistent language has produced conflicting decisions within the federal judiciary. In accordance with the Securities and Exchange Commission (“SEC”)’s own reading of Section 922, several district courts have held that individuals engaging in “whistleblower activities” are entitled to Dodd–Frank’s antiretaliation protections, irrespective of whether these individuals report directly to the SEC or report through internal channels in their own companies. In contrast, the U.S. Court of Appeals for the Fifth Circuit has limited Dodd–Frank’s whistleblowing protections to individuals who report directly to the SEC. This Note contends that remedial legislation like Dodd–Frank should be broadly interpreted to further its purpose, that a broad interpretation of Section 922 is consistent with the text, structure, and legislative history of Dodd–Frank, and that courts unable to resolve the apparent conflict in this section should defer to the SEC’s administrative expertise and interpretation.

TABLE OF CONTENTS

INTRODUCTION	122
I. A CYCLE OF FINANCIAL COLLAPSES AND SUBSEQUENT REMEDIAL FINANCIAL REGULATION	125
A. Sarbanes–Oxley: A New Commitment to Whistleblower Protections	126
1. Sarbanes–Oxley Introduces Internal Whistleblower Protections	126
2. Sarbanes–Oxley’s Whistleblowing Protections Have Been Ineffective	128

* J.D. Candidate, May 2015, University of Michigan Law School. I am truly grateful to the members of the *Michigan Law Review* Notes Office for their patient assistance throughout this process, particularly David Frisof, Stephen Mayer, and Jacob Perkowski. I would also like to thank Michelle Sargent for her invaluable feedback, and my family, Neil, Ellen, and Alex, for their unwavering love and support.

B. <i>Dodd–Frank: A Response to the Subprime Mortgage Crisis and to Sarbanes–Oxley’s Ineffective Protections</i>	129
II. INDIVIDUALS DO NOT NEED TO REPORT DIRECTLY TO THE SEC IN ORDER TO MERIT DODD–FRANK’S ANTIRETALIATION PROTECTIONS	131
A. <i>The Ambiguous Definition of “Whistleblower”</i>	132
B. <i>The District Courts’ Broad Interpretation of Dodd–Frank’s Whistleblower Protection Provision</i>	133
C. <i>The Fifth Circuit Narrowly Interpreted Section 922 Based Purely on the Text</i>	137
III. COURTS CAN FOLLOW THE SUPREME COURT’S GUIDANCE IN HERMAN WITHOUT VIOLATING THE CANONS OF STATUTORY CONSTRUCTION	140
A. <i>Remedial Securities Regulations Should Be Broadly and Flexibly Interpreted</i>	141
B. <i>The Text and Structure of Section 922 Are Consistent with a Broad Interpretation and Do Not Limit the Application of the Herman Rule</i>	143
1. <i>The Text and Structure of Section 922 Reasonably Support a Broad Interpretation</i>	143
2. <i>Courts That Find the Text and Structure of Section 922 Ambiguous Can Defer to the SEC’s Interpretation</i>	144
C. <i>The Legislative History of Dodd–Frank Provides Little Guidance on How Courts Should Interpret Section 922</i>	146
D. <i>Courts That Find Conflict and Ambiguity in Section 922 Should Defer to the SEC’s Interpretation</i>	147
CONCLUSION	148

INTRODUCTION

When the United States’ housing market collapsed in 2008, it sent the country into its worst financial state since the Great Depression. Academics, politicians, and the media have suggested various causes of and potential remedies for the collapse. But while many of the causes and remedies for this particular recession may be novel, the general pattern of a financial collapse followed by increased financial regulations is quite familiar. The United States has suffered many severe financial setbacks in the last century, and each time the federal government’s response has included some form of proposed regulatory solution: the introduction of the Securities Exchange Act of 1934 following the Great Depression;¹ the enactment of the Sarbanes–Oxley Act of 2002 (“SOX”) following the collapses of Enron, WorldCom, and several other prominent corporations;² and the implementation of the

1. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–pp (2012)).

2. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18, 28 and 29 U.S.C.).

Dodd–Frank Wall Street Reform and Consumer Protection Act (“Dodd–Frank”) following the most recent financial crisis.³

In recent years, Congress has endorsed the role of whistleblowers in preventing or mitigating the kinds of financial improprieties that can lead to economic chaos. Accordingly, Congress has incorporated whistleblower protection provisions into its remedial legislation. SOX was the first of these regulatory responses to include comprehensive protections and incentives for corporate whistleblowers. Although there is considerable empirical evidence to suggest that SOX’s whistleblowing program was unsuccessful,⁴ the subsequent introduction of stronger and more expansive whistleblower measures in Dodd–Frank reiterated Congress’s belief that whistleblowers play an important role in financial regulation.

Despite this unambiguous congressional goal, however, the statutory language of both SOX and Dodd–Frank remains ambiguous as to precisely *who* can receive these whistleblower protections. Whereas SOX was unclear about which individuals within an organization are entitled to whistleblower protections (for example, direct employees of a company versus employees of a company’s contractors),⁵ Dodd–Frank’s ambiguity concerns what actions an individual must take in order to receive whistleblower protections.

The heart of the Dodd–Frank debate stems from an internal inconsistency in the way that the statute defines “whistleblower.” Section 922 of Dodd–Frank amended the Securities Exchange Act of 1934 by adding Section 21F (codified at 15 U.S.C. § 78u-6), a new section that includes enhanced protections and incentives for securities whistleblowers.⁶ Within Section 922, § 78u-6(a)(6) (the Definitions Section) explicitly defines a whistleblower as an individual who reports a potential violation to the Securities and Exchange Commission (“SEC”),⁷ but § 78u-6(h)(1) (the Antiretaliation Section)⁸ includes protections for individuals who report directly to the SEC *as well as* for individuals who report internally, through their own company’s compliance systems.⁹ This has created disagreement among the courts regarding whether Dodd–Frank antiretaliation protections

3. Dodd–Frank Wall Street Reform and Consumer Protection (Dodd–Frank) Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 5, 7, 12, 15, 22, 26, 28, 31, and 42 U.S.C.).

4. See *infra* notes 40–43 and accompanying text.

5. See *infra* notes 128–130 and accompanying text.

6. Dodd–Frank Act § 922(a) (codified at 15 U.S.C. § 78u-6 (2012)) (“The Securities Exchange Act of 1934 . . . is amended by inserting . . . the following: ‘Sec. 21F. Securities Whistleblower Incentives and Protection.’”).

7. 15 U.S.C. § 78u-6(a)(6) (2012) (“The term ‘whistleblower’ means any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.”).

8. *Id.* § 78u-6(h)(1). This provision is formally called “Prohibition against retaliation.” *Id.* I will refer to it as the “Antiretaliation Section” for purposes of clarity.

9. *Id.* §§ 78u-6(h)(1)(A)(i)–(iii) (“No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—(i) in providing information to the Commission in accordance with this

should be limited to individuals who report directly to the SEC (external whistleblowers) or should include individuals who report through their companies (internal whistleblowers). Antiretaliation protections can give whistleblowers the security and confidence they need to report potential violations, and such protections can also deter companies from committing these violations in the first place. Studies have demonstrated that a majority of corporate whistleblowing is done internally¹⁰ and that internal whistleblowing provides numerous advantages over external whistleblowing.¹¹ Accordingly, resolving this dispute is crucial to the long-term effectiveness of Dodd–Frank.

District courts in New York, Connecticut, Colorado, and Tennessee have interpreted the statute broadly to protect both internal and external whistleblowers.¹² The SEC has adopted a similar reading.¹³ In contrast, the U.S. Court of Appeals for the Fifth Circuit has interpreted Dodd–Frank’s whistleblowing protections more narrowly, limiting protection only to those individuals who report potential violations directly to the SEC.¹⁴

Although the Supreme Court has yet to address Section 922 directly, it has provided some guidance on interpreting ambiguities in remedial legislation. In *Herman & MacLean v. Huddleston*, the Court held that remedial legislation—specifically, securities regulations—should be broadly and flexibly interpreted.¹⁵ Consistent with *Herman*, then, this Note contends that Dodd–Frank’s whistleblowing protections should be interpreted broadly to include individuals reporting externally to the SEC as well as those individuals reporting internally “under . . . any other law, rule, or regulation subject to the jurisdiction of the [SEC].”¹⁶

Part I details the history of SOX and Dodd–Frank, highlighting the remedial nature of both of these statutes and underscoring that Dodd–Frank’s whistleblower measures were meant to be an expansion and enhancement of SOX’s program. Part II introduces the split between the Fifth Circuit and the district courts of other circuits and discusses the differing rationales behind both the broad and narrow interpretations of “whistleblower” in Dodd–Frank. Part II also argues that the district courts’ rationales for interpreting Section 922 broadly comport with the remedial purposes animating

section; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 . . . and any other law, rule, or regulation subject to the jurisdiction of the Commission.”).

10. See Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 AM. BUS. L.J. 267, 301 (1991) (citing studies).

11. These advantages are detailed *infra* in Section I.A.1 as well as in the Conclusion of this Note.

12. See *infra* Section II.B.

13. See *infra* Section II.B.

14. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013).

15. 459 U.S. 375, 386–87 (1983).

16. 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2012).

Dodd–Frank and should prevail over the Fifth Circuit’s narrow interpretation, which is unpersuasive and incorrect. Part III asserts that Dodd–Frank’s text, structure, and legislative history counsel in favor of interpreting the Act in accordance with *Herman*’s principles on remedial legislation. Ultimately, this Note concludes that because Dodd–Frank and its whistleblower protection provisions are remedial in nature, courts should interpret ambiguous sections as broadly and flexibly as the text permits.

I. A CYCLE OF FINANCIAL COLLAPSES AND SUBSEQUENT REMEDIAL FINANCIAL REGULATION

Many of the most sweeping pieces of financial regulation in the United States over the past century can be viewed as remedial legislative responses to a series of severe market collapses¹⁷: the Securities Exchange Act in 1934 in response to the market instability of the 1920s and 1930s;¹⁸ SOX in 2002 after the collapses of Enron, WorldCom, Tyco, and several other prominent corporations;¹⁹ and Dodd–Frank in 2010 in response to the financial collapse of 2008.²⁰ These statutes all share a common purpose: to remedy a perceived problem in the financial sector.²¹ The remedial nature of Dodd–Frank is paramount in resolving questions of statutory interpretation because the Supreme Court has specifically held that remedial statutes should be given broad and expansive interpretations.²² Section I.A details the history of SOX and the introduction of federal whistleblower protections. Section I.B explains Dodd–Frank as a response to the 2008 financial crisis and asserts that Dodd–Frank’s whistleblower protections were designed to remedy the causes of this most recent crisis, to enhance the existing protections in SOX, and to reaffirm Congress’s intent that financial regulations should include a robust corporate whistleblower protection scheme.

17. Recent Legislation, *Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC*, 124 HARV. L. REV. 1829, 1832 (2011); see also Dorit Samuel, *The Subprime Mortgage Crisis: Will New Regulations Help Avoid Future Financial Debacles?*, 2 ALB. GOV’T L. REV. 217, 223–29 (2009) (“Financial crises, of varying severity, have been a recurring historical phenomenon.”).

18. See Zachary Karabell, *The Man Who Called the Credit Crunch*, NEWSWEEK (Jan. 9, 2009), <http://www.newsweek.com/man-who-called-credit-crunch-78053>.

19. See *id.*

20. Michael S. Barr, *The Financial Crisis and the Path of Reform*, 29 YALE J. ON REG. 91, 96 (2012) (“The Dodd–Frank Act was the government’s historic response to the causes of the economic crisis.”).

21. For example, SOX took “a new approach to [financial] regulation that relie[d] on internal monitoring, reporting, and problem solving.” Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1251 (2009).

22. Morefield, Case No. 2004-SOX-00002, 2004 WL 5030303, at *2 (Dep’t of Labor Jan. 28, 2004) (“[I]t does not serve the purposes or policies of [SOX] to take too pinched a view of this remedial statute when it comes to protecting those in an organization who can address the concerns Congress sought to correct.”); see also Robert G. Vaughn, *America’s First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV. 1, 7 (2005) (contending that remedial statutes should be interpreted broadly).

A. Sarbanes–Oxley: A New Commitment to Whistleblower Protections

In 2001, large companies such as Enron, WorldCom, and Tyco became well known for engaging in accounting fraud and other corrupt and abusive business practices. The companies used a variety of fraudulent tactics to misrepresent their financial solvency, hide debt, and deceive investors and shareholders.²³ Congress enacted SOX to respond to the public's anger toward these companies and to remedy perceived weaknesses in the laws that supposedly provided checks against corrupt corporate practices.²⁴ One of the primary policy goals of SOX was to establish both internal and external systems to identify and quickly fix potential securities violations (such as submitting fraudulent reports to the SEC).²⁵ To accomplish this goal, SOX was passed to provide protections and incentives for corporate whistleblowers.²⁶

1. Sarbanes–Oxley Introduces Internal Whistleblower Protections

SOX represented an affirmation of Congress's commitment to expand and enhance state whistleblowing laws, which had already begun to emerge throughout the United States during the 1980s and 1990s²⁷ through protections at the federal level.²⁸ SOX has three whistleblower sections, but for the purposes of this Note the most significant is Section 806.²⁹ This section contains SOX's antiretaliation protections, which forbid companies covered by

23. See, e.g., Andrew Backover & Thor Valdmanis, *WorldCom Scandal Brings Subpoenas, Condemnation*, USA TODAY, June 28, 2002, at A1; Nancy Dillon, *SEC Sets New Tyco Probe, Transactions Targeted, CFO May Be on the Way Out*, N.Y. DAILY NEWS, June 12, 2002, at 53; C. Bryson Hull, *Once Mighty Enron Now a Step from the Abyss*, PITTSBURGH POST-GAZETTE, Nov. 29, 2001, at E8; Richard A. Oppel Jr., *House Panel's Investigation of Global Crossing Is Started*, N.Y. TIMES, Mar. 13, 2002, at C2; *The Rise and Fall of WorldCom*, USA TODAY, Apr. 19, 2004, at B5.

24. Vaughn, *supra* note 22, at 2.

25. See Megan Foscaldi, Recent Development, *Whistleblower Provisions of the Dodd-Frank Act*, 31 REV. BANKING & FIN. L. 486, 492 (2012).

26. Although empirical studies suggest that these protections and incentives were not particularly effective in encouraging or protecting corporate whistleblowers. See *infra* notes 40–43 and accompanying text.

27. See Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 99–115 (2000).

28. Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1758 (2007) (“[SOX] represents a reification by the [U.S.] Congress of the importance of whistleblowing in the control, detection, and deterrence of wrongdoing.”).

29. The other whistleblower-related sections in SOX are Section 1107 and Section 301. Section 1107 amended the Obstruction of Justice Statute by creating criminal penalties for whistleblower retaliation. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 1107, 116 Stat. 745, 810 (codified at 18 U.S.C. § 1513(e) (2012)) (“Whoever knowingly, with the intent to retaliate, takes any action harmful to any person . . . for providing to a law enforcement officer any truthful information relating to the commission . . . of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.”). Section 301 requires companies to create audit committees with internal procedures through which employees can provide complaints about questionable accounting or auditing. Sarbanes–Oxley Act of 2002 § 301, 15 U.S.C. § 78j-1(m)(4) (2012) (“Each audit committee shall establish procedures for

SOX to “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee” for engaging in protected whistleblowing activities.³⁰ SOX extends these antiretaliation protections to individuals who report to “(A) . . . Federal regulatory or law enforcement agenc[ies]; (B) . . . Member[s] or . . . committees of Congress; or (C) . . . person[s] with supervisory authority over the employee.”³¹

This expansive array of options for corporate whistleblowers in Section 806 is important for two reasons. First, Section 806 demonstrates a strong congressional commitment to whistleblower protections. Senator Leahy, one of the key supporters of the whistleblower protections in SOX, stressed the importance of strong whistleblower protections while commenting on the Conference Committee Report.³² Second, SOX marks a departure from most existing state and federal whistleblower regulations, which primarily protect only external disclosures.³³ Section 806 specifically provides whistleblower protections to employees of publicly traded companies who report acts of fraud externally to authorized federal officials as well as to those employees who report *internally* to supervisors or appropriate individuals within their own companies.³⁴

There are several potential reasons why Congress may have included protections for internal whistleblowers in SOX. In the case of Enron, for example, the key whistleblowing actions came from internal reporting. When the vice president of Corporate Development at Enron, Sherron Watkins, reported her concerns about the company’s potentially fraudulent actions to the CEO, Ken Lay, the company discussed firing Watkins.³⁵ Watkins’s actions have been criticized for not being transparent or timely enough to count as “whistleblowing”;³⁶ had stronger whistleblower protections (particularly internal protections) existed at that time, however, she might have been more willing fully and promptly to report her concerns. In light of Enron’s implosion and the absence of meaningful whistleblowing at

. . . the confidential, anonymous submission by employees of the issue concerns regarding questionable accounting or audit manners.”).

30. Sarbanes–Oxley Act of 2002 § 806(a), 18 U.S.C. § 1514A(a).

31. *Id.* §§ 1514A(a)(1)(A)–(C) (emphasis added) (demonstrating SOX’s antiretaliation protections for internal whistleblowers specifically in section (C)).

32. 148 CONG. REC. 14,447 (2002) (statement of Sen. Patrick Leahy) (“[W]e include meaningful protection[] for . . . whistleblowers as passed by the Senate. We learned from Sherron Watkins[, Vice President] of Enron[,] that these corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court. . . . There is no way that we could have known about [the machinations of corporate officials] without that kind of a whistleblower.”).

33. Dworkin, *supra* note 28, at 1760 (“Section 806 is unusual in specifying internal whistleblowing as an appropriate channel. Most state and federal statutes designate only an external recipient.”).

34. 148 CONG. REC. 14,448–50 (2002) (statement of Sen. Patrick Leahy).

35. Vaughn, *supra* note 22, at 60 n.225 (“[A]ttorneys for the company submitted a memorandum setting out how Watkins could be fired.”).

36. See Dan Ackman, *Sherron Watkins Had Whistle, but Blew It*, FORBES (Feb. 14, 2002, 3:50 PM), <http://www.forbes.com/2002/02/14/0214watkins.html>.

the company, it is understandable that Congress would draft legislation encouraging and protecting internal whistleblowing in the future. Congress may have also considered that most reporting is done internally and therefore sought to create broad protections to avoid discouraging any form of whistleblowing.³⁷ Individuals may feel more confident and be more willing to report internally because such reporting demonstrates their loyalty to the organization. A third theory is that Congress recognized that internal whistleblowing permits companies to remedy violations quickly and confidentially, minimizing misunderstanding and preventing the erosion of public confidence.³⁸ This makes it less likely that companies will suffer losses (due to weary investors and unstable or declining stock prices) or that employees will be unfairly punished or fired for merely discovering potential violations and prudently attempting to remedy them.³⁹ Thus, both companies and Congress have strong incentives to provide in-house remedies for violations. Whatever the rationale, SOX exemplified Congress's commitment to a robust whistleblower protection scheme with specific protections for internal whistleblowers. Unfortunately, in practice, SOX's whistleblower protections have had more bark than bite.

2. Sarbanes–Oxley's Whistleblowing Protections Have Been Ineffective

Empirical research suggests that SOX's whistleblower protections have neither effectively encouraged whistleblowers nor consistently rewarded them for their whistleblowing actions. A detailed 2010 study found that instead of supporting employee whistleblowing activity, SOX might have actually inhibited it.⁴⁰ After SOX was introduced, the percentage of whistleblowers who were employees of the violating companies actually dropped from 18.4% to 13.2%,⁴¹ and the Occupational Safety and Health Administration (the federal agency charged with handling SOX whistleblower complaints) initially resolved only "3.6% of cases . . . in favor of complaining employees."⁴² Another study found that of the "677 completed

37. Dworkin, *supra* note 28, at 1760 ("[I]nternal reporting is the most common type of initial whistleblowing").

38. *Id.* For example, in cases where a securities violation was a simple accounting oversight rather than an intentional flouting of securities laws, internal reporting allows companies to avoid misunderstandings with the SEC. *See id.* But internal reporting "may also allow for cover-ups, as happened in some of the . . . scandals" discussed *supra* in this Section. *Id.*

39. *See id.*

40. *See* Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2250 (2010).

41. *Id.* at 2249–50 (comparing the percentage of whistleblowers pre- and post-SOX by their various occupations: employees of the violating company, SEC employees, auditors, media, etc.).

42. Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73, 84. For a detailed analysis of why SOX claims tended to lose, see Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65 (2007).

Sarbanes–Oxley complaints, 499 were dismissed and 95 were withdrawn Of the cases that went to an administrative law judge . . . only 6 (two percent) of the 286 resulted in a decision for the employee.”⁴³

There are several potential explanations for SOX’s failure to encourage and protect more corporate whistleblowers. First, the antiretaliation provision in SOX originally provided only a very short ninety-day window during which terminated employees could file a claim.⁴⁴ It is possible that many potential claimants did not learn of their rights under SOX in such a short period and so were statutorily barred from submitting a claim.⁴⁵ Second, the remedies and incentives provided may not have been particularly tempting, especially to employees who were aware of SOX but were unsure of whether it was worthwhile to become a whistleblower. Although strongly worded floor speeches suggest that Congress intended to provide sufficient incentives to encourage corporate whistleblowers,⁴⁶ the actual statutory relief only guarantees “reinstatement with the same seniority[,] . . . back pay, with interest[, and] . . . compensation for any special damages [resulting from] the discrimination, including litigation costs, expert witness fees and reasonable attorney fees.”⁴⁷ This simply may not have been enough to incentivize employees to disclose violations, especially considering the perceived fear of retribution from their employers if they did elect for reinstatement. Finally, the procedural complexities of filing a claim could have either discouraged or prevented potential claimants from utilizing SOX’s protections.⁴⁸ Whatever the reasons, SOX did not spur the levels of whistleblowing activity that members of Congress like Leahy probably had in mind when Congress first passed the bill.⁴⁹

B. *Dodd–Frank: A Response to the Subprime Mortgage Crisis and to Sarbanes–Oxley’s Ineffective Protections*

During the 2000s, subprime lending and the mortgage securitization business created much uncertainty and systemic risk throughout the financial sector. Subprime lenders provided loans to borrowers who could not qualify for the standard (prime) interest rates because of their poor credit

43. Dworkin, *supra* note 28, at 1764–65.

44. Sarbanes–Oxley Act of 2002, § 806(a), Pub. L. No. 107-204, 116 Stat. 745, 803 (“An action . . . shall be commenced not later than 90 days after the date on which the violation occurs.”), *amended by* Dodd–Frank Wall Street Reform and Consumer Protection (Dodd–Frank) Act, § 922(c), Pub. L. No. 111-203, 124 Stat. 1376, 1848 (2010) (striking “90” and inserting “180,” codified as amended at 18 U.S.C. § 1514A(b)(2) (2012)).

45. Dworkin, *supra* note 28, at 1763.

46. *See supra* note 32 and accompanying text.

47. 18 U.S.C. § 1514A(c)(2) (2012).

48. Under SOX, a whistleblower must first file a complaint with the secretary of labor and can only file an action in district court if the secretary has not issued a decision within 180 days of the original complaint. 18 U.S.C. § 1514A(b)(1).

49. *See* Moberly, *supra* note 42, at 74 (“Sarbanes–Oxley failed to fulfill the great expectations generated by the Act’s purportedly strong anti-retaliation protections.”).

histories. These loans and mortgages were then bundled into mortgage-backed securities and traded on the financial markets. As borrowers began to default on their loans, financial institutions realized that these securities had far less value than anticipated.⁵⁰ In response to this realization, financial institutions attempted to hide the diminishing value of their mortgage-backed holdings,⁵¹ contributing significantly to what would become the worst financial collapse in the United States since the Great Depression.⁵²

In response to the market collapse of 2008 and the multitude of bank failures that followed,⁵³ Congress considered whether regulatory reform was needed. As with its response to previous financial crises, Congress passed remedial legislation—this time in the form of Dodd–Frank.⁵⁴ The 848-page comprehensive regulatory package⁵⁵ demonstrated Congress’s belief (or, at least, its response to the public’s belief) that “financial institutions cannot be left to regulate themselves, and that without clear rules, transparency, and accountability, financial markets break down, sometimes catastrophically.”⁵⁶ Like SOX, Dodd–Frank reaffirmed Congress’s commitment to protecting corporate whistleblowers.

President Obama signed Dodd–Frank into law on July 21, 2010.⁵⁷ When passed, Dodd–Frank evinced congressional support for strong whistleblower protections. As Senator Cardin remarked, “The whistleblower protections that are extended in this legislation will allow employees to come forward with information without fear of retribution by their employer. It is a very important provision, and I am glad it was included in the final legislation.”⁵⁸

50. For a concise explanation of the events described above, see Todd M. Galante & Antonio Gutierrez, *The Subprime Meltdown and Its Arrival in the Courtroom*, N.J. LAW., Feb. 2008, at 44.

51. E.g., *SEC Enforcement Actions: Addressing Misconduct That Led to or Arose from the Financial Crisis*, U.S. SEC (Dec. 12, 2013), <https://www.sec.gov/spotlight/enf-actions-fc.shtml#keyStatistics> (“SEC charged Walter A. Morales and his Baton Rouge-based firm with defrauding investors by hiding millions of dollars in losses suffered during the financial crisis from investments tied to residential mortgage-backed securities. . . . SEC charged two former Bear Stearns Asset Management portfolio managers for fraudulently misleading investors about the financial state of the firm’s two largest hedge funds and their exposure to subprime mortgage-backed securities before the collapse of the funds in June 2007. . . . SEC charged entities and executives with making misleading statements to investors in marketing a mutual fund heavily invested in mortgage-backed and other risky securities.”).

52. See Barr, *supra* note 20, at 92.

53. There were 25 bank failures in 2008, 140 in 2009, and 157 in 2010. *Bank Failures in Brief: 2008*, FDIC, <http://www.fdic.gov/bank/historical/bank/2008/index.html> (last updated Jan. 2, 2014); *Bank Failures in Brief: 2009*, FDIC, <http://www.fdic.gov/bank/historical/bank/2009/index.html> (last updated Jan. 2, 2014); *Bank Failures in Brief: 2010*, FDIC, <http://www.fdic.gov/bank/historical/bank/2010/index.html> (last updated Jan. 2, 2014).

54. Recent Legislation, *supra* note 17, at 1832 (“SOX, like Dodd–Frank, was passed in response to a financial crisis . . .”).

55. Dodd–Frank Wall Street Reform and Consumer Protection (Dodd–Frank) Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

56. Barr, *supra* note 20, at 92.

57. Dodd–Frank Act, 124 Stat. at 2223.

58. 156 CONG. REC. S5872 (daily ed. July 15, 2010) (statement of Sen. Ben Cardin).

For his part, Leahy, who, again, was a principal author of the whistleblower protection provisions, repeatedly affirmed his own unambiguous support.⁵⁹

Demonstrating Congress’s continued commitment to a robust corporate whistleblower protection scheme, Dodd–Frank includes a wide variety of measures to strengthen both the protections and incentives for corporate whistleblowers.⁶⁰ Dodd–Frank offers considerably greater financial incentives for whistleblowers than does SOX. Whistleblowers under Dodd–Frank can recover double back pay,⁶¹ as opposed to back pay with interest under SOX.⁶² Dodd–Frank also provides a longer statute of limitations for potential claimants to file claims—up to six years after the violation itself or three years after discovering the violation (provided the claim is brought within ten years of the actual violation).⁶³ Finally, Dodd–Frank eases some of the procedural hurdles of SOX by creating a direct private right of action; whistleblowers can now file a complaint directly in district court without first filing a complaint with the Department of Labor and then having to wait for a ruling.⁶⁴

Yet even though these and other provisions in Dodd–Frank⁶⁵ demonstrate Congress’s commitment to expanding and strengthening corporate whistleblower protections, Congress was far less precise regarding *whom* it intended these new provisions to protect.

II. INDIVIDUALS DO NOT NEED TO REPORT DIRECTLY TO THE SEC IN ORDER TO MERIT DODD–FRANK’S ANTIRETALIATION PROTECTIONS

The confusion surrounding which individuals are entitled to whistleblower protection under Dodd–Frank stems from a conflict in the text of Section 922, the whistleblower protection provision itself. Section II.A explains the ambiguity and conflict in Section 922: the Definitions Section allows only individuals reporting externally to the SEC to be considered

59. 156 CONG. REC. S5913 (daily ed. July 15, 2010) (statement of Sen. Patrick Leahy) (“As chairman of the Senate Judiciary Committee, I am particularly pleased that the conference report also includes provisions I authored, working with Senator Grassley, Senator Specter, and Senator Kaufman, to . . . protect whistleblowers who help uncover these crimes.”).

60. 156 CONG. REC. S5929 (daily ed. July 15, 2010) (statement of Sen. Chris Dodd) (“The Congress intends that the SEC make awards that are sufficiently robust to motivate potential whistleblowers to share their information and to overcome the fear of risk of the loss of their positions. Unless the whistleblowers come forward, the Federal Government will not know about the frauds and misconduct.”).

61. Relief for successful Dodd–Frank claims includes reinstatement with the same seniority status, double back pay, and compensation for litigation costs. 15 U.S.C. §§ 78u-6(h)(1)(C)(i)–(iii) (2012).

62. 18 U.S.C. § 1514A(c)(2)(B).

63. Compare 15 U.S.C. § 78u-6(h)(1)(B)(iii), with 18 U.S.C. § 1514A(b)(2)(D).

64. Compare Recent Legislation, *supra* note 17, at 1831, with 18 U.S.C. 1514A(b)(1).

65. For a more complete breakdown of the whistleblower enhancements in Dodd–Frank, see Recent Legislation, *supra* note 17, at 1833–34.

Dodd–Frank whistleblowers, but the Antiretaliation Section grants protections to individuals reporting externally or internally within their own company. Section II.B then outlines the decisions of the various district courts interpreting Section 922 broadly and resolving the conflict by granting Dodd–Frank antiretaliation protections to both internal and external whistleblowers. Finally, Section II.C analyzes the Fifth Circuit’s recent decision to interpret Section 922 narrowly and restrict the antiretaliation protections to cover only external whistleblowers. This Section argues that the Fifth Circuit’s reasoning behind this interpretation ultimately proves unpersuasive. Throughout Part II, this Note points out that even though each court engages in an extensive statutory analysis, none focuses on the *remedial* purpose of Section 922 or of Dodd–Frank more generally. Nor do the courts consider the Supreme Court’s guidance in *Herman*.

A. *The Ambiguous Definition of “Whistleblower”*

The Definitions Section declares that a whistleblower is “any individual who provides . . . information relating to a violation of the securities laws to the [SEC], in a manner established, by rule or regulation, by the [SEC].”⁶⁶ In isolation, this definition indicates that individuals are only whistleblowers under Dodd–Frank if they report directly to the SEC.⁶⁷ But the Antiretaliation Section of Dodd–Frank specifically states that employers cannot discharge whistleblowers who provide “information to the Commission” or who make “disclosures that are required or protected under the Sarbanes–Oxley Act of 2002 . . . [or] any other law, rule, or regulation subject to the jurisdiction of the Commission.”⁶⁸ Because SOX protects whistleblowers who report internally to an employee with “supervisory authority” in their own company,⁶⁹ the Antiretaliation Section can be read to protect both external and internal whistleblowers.

These two sections create an obvious problem: the Antiretaliation Section, which allows for internal reporting, seems to conflict with the Definitions Section, which refers only to external reporting.⁷⁰ This textual inconsistency has been litigated in several federal courts, and those courts have adopted one of two approaches. On the one hand, some courts have interpreted Section 922 broadly, holding that Dodd–Frank affords whistleblower protections to individuals regardless of whether they report

66. 15 U.S.C. § 78u-6(a)(6).

67. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 623 (5th Cir. 2013) (holding that the plain language of the Dodd–Frank whistleblower protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC).

68. 15 U.S.C. §§ 78u-6(h)(1)(A)(i)–(iii).

69. Bradford K. Newman & Shannon S. Sevey, *Protections for Whistleblowers Under Sarbanes–Oxley*, PRAC. LAW., Apr. 2005, at 39, 41.

70. *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 994 n.9 (M.D. Tenn. 2012).

directly to the SEC or through their companies' internal compliance programs.⁷¹ On the other hand, some courts have interpreted the section narrowly and held that individuals are only entitled to whistleblower protections if they report their concerns directly to the SEC.⁷² As detailed *infra* in Sections II.B and II.C, although each of the courts makes persuasive arguments for its own interpretive solution to this ambiguity (based either on text, structure, or deference to the SEC), all of their decisions fail to focus on the *purpose* behind Dodd–Frank and the guidance that the Supreme Court provided in *Herman*.

B. *The District Courts' Broad Interpretation of Dodd–Frank's Whistleblower Protection Provision*

Five district courts have considered the scope of Dodd–Frank whistleblower protections in Section 922. The first two courts only addressed the issue in dicta,⁷³ but in several more recent decisions, three district courts reached the issue in their holdings.⁷⁴ The courts' rationales for their interpretations varied: some courts used the basic tools of statutory construction while others deferred to the SEC's interpretation. Regardless of their interpretive methods, however, the courts all found (or held) that Section 922 should be interpreted broadly to protect both external and internal whistleblowers.

In the first reported decision interpreting the breadth of whistleblower protection under Dodd–Frank, *Egan v. TradingScreen, Inc.*,⁷⁵ the U.S. District Court for the Southern District of New York suggested in dicta that internal whistleblowers could be entitled to Dodd–Frank antiretaliation protections.⁷⁶ The court observed that limiting this section to external whistleblowers would render the internal whistleblower protections in the

71. See, e.g., *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914 (JMF), 2013 U.S. Dist. LEXIS 71945, at *1 (S.D.N.Y. May 21, 2013) (holding that Dodd–Frank whistleblower protections apply to internal whistleblowers); *Genberg v. Porter*, 935 F. Supp. 2d 1094 (D. Colo. 2013); *Nollner*, 852 F. Supp. 2d 986; *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 U.S. Dist. LEXIS 136939 (D. Conn. Sept. 25, 2012) (noting in dicta that Dodd–Frank whistleblower protections apply regardless of whether an individual reports directly to the SEC or through internal compliance programs); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 U.S. Dist. LEXIS 47713 (S.D.N.Y. May 4), *dismissed by* No. 10 Civ. 8202 (LBS), 2011 U.S. Dist. LEXIS 103416 (S.D.N.Y. Sept. 12, 2011).

72. See *Asadi*, 720 F.3d 620.

73. See *infra* notes 75–80 and accompanying text.

74. See *infra* notes 85–100 and accompanying text.

75. 2011 U.S. Dist. LEXIS 47713. In 2009, Patrick Egan, an employee at TradingScreen, Inc., learned that the CEO of his company was diverting corporate assets to another company, costing TradingScreen hundreds of thousands of dollars. Egan reported his concerns internally but never reported the potential violations to the SEC. Egan was fired eight months later and brought claims against TradingScreen seeking relief under Dodd–Frank. *Egan*, 2011 U.S. Dist. LEXIS 47713, at *1, *3–9.

76. See *id.* at *9–19.

Antiretaliation Section superfluous.⁷⁷ Thus, it argued that courts considering Section 922 should interpret it broadly to cover both internal and external whistleblowers.

A year later, the court's observations were echoed by the U.S. District Court for the Middle District of Tennessee in *Nollner v. Southern Baptist Convention, Inc.*⁷⁸ The court ultimately dismissed the plaintiff's Dodd–Frank claim, holding that the violations were not under the SEC's jurisdiction.⁷⁹ In dicta, however, the court laid out a clear and concise summary of the minimum showing a plaintiff must make to benefit from Dodd–Frank's antiretaliation protections:

(1) [the plaintiff] was retaliated against for reporting a violation of the securities laws[;] (2) the plaintiff reported that information to the SEC or to another entity (*perhaps even internally*) as appropriate; (3) the disclosure was made pursuant to a law, rule, or regulation subject to the SEC's jurisdiction; and (4) the disclosure was "required or protected" by that law, rule, or regulation within the SEC's jurisdiction.⁸⁰

Although only dicta, this framework was later used by the federal district court in Colorado to help decide the issue in that case.⁸¹ After the decisions in *Egan* and *Nollner* hinted at this ambiguity in Dodd–Frank, the SEC stepped in to provide its own guidance.

On June 13, 2011,⁸² the SEC promulgated rules adopting a broad interpretation of Section 922 in an attempt to resolve the conflict between the Definitions Section and the Antiretaliation Section.⁸³ Shortly after these rules were announced, the U.S. District Court for the District of Connecticut decided *Kramer v. Trans–Lux Corp.*⁸⁴ There, the court gave deference to the SEC's recent rulemaking and *held*⁸⁵ that a broad interpretation of Section

77. *Id.* at *11.

78. 852 F. Supp. 2d 986, 994 n.9 (M.D. Tenn. 2012). Like in *Egan*, the plaintiff in *Nollner* claimed violations of Dodd–Frank's whistleblower antiretaliation protections based on his own internal reporting. *Nollner*, 852 F. Supp. 2d at 990.

79. *Id.* at 997 ("[T]he defendants are not . . . 'subject to the jurisdiction' of the SEC Moreover, the violations reported by Mr. Nollner do not 'relate to violations of the securities laws'").

80. *Id.* at 995 (emphasis added).

81. See *infra* notes 90–91 and accompanying text.

82. See Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,304 (June 13, 2011) (codified at 17 C.F.R. §§ 240.21F, 249.1800–1801 (2013)).

83. 17 C.F.R. § 240.21F-2(b) (2013). The SEC clarified that "[f]or purposes of the anti-retaliation protections . . . [individuals are] *whistleblower[s]* if . . . [they] possess a reasonable belief that the information [they] are providing relates to a possible securities law violation . . . [and] provide that information in a manner described in [the Antiretaliation Section of Dodd–Frank]." *Id.* (emphasis added).

84. No. 3:11cv1424 (SRU), 2012 U.S. Dist. LEXIS 136939 (D. Conn. Sept. 25, 2012).

85. This was the first court actually to reach the issue of the scope of Dodd–Frank's whistleblower protections under Section 922. See *Murray v. UBS Securities, LLC*, No. 12 Civ. 5914 (JMF), 2013 U.S. Dist. LEXIS 71945, at *8 (S.D.N.Y. May 21, 2013) (listing cases).

922’s whistleblower protections was appropriate.⁸⁶ The *Kramer* court’s decision to follow the SEC’s guidance was based on the Supreme Court’s long-standing doctrine of judicial deference to agency interpretations of ambiguous statutes—a doctrine it first articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁸⁷ Applying *Chevron*’s two-part test,⁸⁸ the *Kramer* court determined that the statute was ambiguous, concluded that the SEC’s interpretation was permissible, and thus adopted the agency’s interpretation.⁸⁹

The next reported case interpreting the scope of Dodd–Frank arose in Colorado.⁹⁰ In *Genberg v. Porter*, the U.S. District Court for the District of Colorado evaluated the plaintiff’s Dodd–Frank whistleblower claim following the model laid out in *Nollner*.⁹¹ The court noted that the Antiretaliation Section “is in *direct conflict* with the [Definitions Section] because it provides protection to persons who have not disclosed information to the SEC.”⁹² The court’s recognition of the “direct conflict” in Section 922 both reaffirmed that a broad interpretation was permissible⁹³ and implicitly sanctioned *Kramer*’s decision to defer to the SEC.

86. *Kramer* held that it was both appropriate to defer to the SEC’s interpretation of Dodd–Frank’s antiretaliation protections and that the SEC’s broad interpretation was a permissible one. *Kramer*, 2012 U.S. Dist. LEXIS 136939, at *12–13 (“The SEC’s rule is a permissible construction of the Dodd–Frank Act, and, accordingly, [the court] must follow it.”).

87. 467 U.S. 837 (1984).

88. *Chevron* set up a two-part test: If Congress has spoken directly on an issue, the “court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842–43. By contrast, if a statute is silent or ambiguous with respect to an issue, the court’s review is limited to whether or not the agency’s interpretation is a permissible construction of the statute. *Id.* at 843. In other words, if the statute is ambiguous, “*Chevron* deference” requires courts to defer to the appropriate agency’s interpretations, as long as those interpretations are permissible.

89. See *Kramer*, 2012 U.S. Dist. LEXIS 136939, at *10, *13.

90. See *Genberg v. Porter*, 935 F. Supp. 2d 1094 (D. Colo. 2013). In *Genberg*, the plaintiff was fired for internally reporting that his company violated SEC rules by allowing its board of directors to vote on corporate shares without guidance from its corporate shareholders. *Id.* at 1098–99.

91. *Id.* at 1105 (citing *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986 (M.D. Tenn. 2012)).

92. *Id.* at 1106 (emphasis added).

93. Consistent with *Egan* and *Nollner*, the court in *Genberg* held that applying whistleblower antiretaliation protections only to external whistleblowers would effectively render portions of the Antiretaliation Section meaningless. *Id.* Courts strive to avoid interpretations that make any part of a statute moot. *FDIC v. Canfield*, 967 F.2d 443, 447 (10th Cir. 1992) (“The officers and directors offer a reading . . . contrary to the established principle of statutory construction that ‘[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.’” (alteration in original) (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (5th ed. 1992))); *Bridger Coal Co. v. Dir., Office of Workers’ Comp. Programs*, U.S. Dep’t of Labor, 927 F.2d 1150, 1153 (10th Cir. 1991).

Finally, and most recently, in *Murray v. UBS Securities, LLC*,⁹⁴ the District Court for the Southern District of New York evaluated the two competing interpretations of this section and concluded that although both were permissible, neither was mandatory.⁹⁵ The court looked to the trend in recent case law,⁹⁶ the basic tools of statutory construction, and the SEC's promulgated rules,⁹⁷ paying particular attention to the SEC's own explanatory comments.⁹⁸ Under the SEC's view, the antiretaliation provisions of Dodd-Frank clearly apply to individuals regardless of whether they report to the SEC.⁹⁹ And "because the SEC's rule clarifies an ambiguous statutory scheme . . . and reflects the considerable experience and expertise that the agency has acquired over time with respect to interpretation and enforcement of the securities laws," the court followed *Kramer* and deferred to the SEC's interpretation.¹⁰⁰

These five cases demonstrate the judicial history of the broad interpretation of Dodd-Frank's whistleblower protections: recognition of the conflict in *Egan*; a framework for proving an antiretaliation claim in *Nollner*; deference to the SEC in *Kramer*; affirmation of the statutory conflict in *Genberg*; and, finally, a comprehensive synthesis of the case law and deference to the SEC's final rules in *Murray*. These textual, structural, and agency-deference interpretations of the statute are all reasonable. Yet none of the courts' analyses focused on the remedial *purpose* of Dodd-Frank—particularly as reflected in the Act's whistleblower protections—despite the Supreme Court precedent to do so.

94. This is the most recent district court case regarding the scope of Section 922. See *infra* note 96.

95. No. 12 Civ. 5914 (JMF), 2013 U.S. Dist. LEXIS 71945 (S.D.N.Y. May 21, 2013). Thus, the court found that the statute was ambiguous. *Id.* at *13–15; cf. *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 120 (2d Cir. 2007) (noting that competing permissible interpretations of a statute demonstrate that the statutory text is ambiguous); *PDK Labs. Inc. v. U.S. DEA*, 362 F.3d 786, 796 (D.C. Cir. 2004) (holding that simply because a statute "is susceptible of one construction does not render its meaning plain if it is also susceptible of another, plausible construction").

96. *Murray*, 2013 U.S. Dist. LEXIS 71945, at *8 ("[F]our other district court judges have confronted this exact issue, and each one has endorsed [a broad] reading of the statute.").

97. *Id.* at *8–9.

98. *Id.* at *9 ("[F]or purposes of the anti-retaliation protections, an individual must provide the information in a manner described in Section 21F(h)(1)(A). This change to the rule reflects the fact that the statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities other than the Commission." (quoting Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,304 (June 13, 2011) (codified at 17 C.F.R. § 240.21F (2013))) (internal quotation marks omitted)).

99. *Id.* at *10–11.

100. *Id.* at *20–21.

C. *The Fifth Circuit Narrowly Interpreted Section 922 Based Purely on the Text*

While the five district courts have interpreted Section 922 broadly enough to allow for antiretaliation protections for both internal and external whistleblowers, the U.S. Court of Appeals for the Fifth Circuit recently took a much narrower approach, holding that Dodd–Frank antiretaliation protections should apply only to external whistleblowers. This Section will first articulate how the Fifth Circuit justified its narrow interpretation and then explain why the court’s reasoning is ultimately unpersuasive.

Although the Fifth Circuit recognized that other courts, as well as the SEC, had interpreted Dodd–Frank to protect both types of whistleblowers, it held that the statute unambiguously determined both “who is protected[] and . . . what actions by protected individuals constitute protected activity.”¹⁰¹ The Fifth Circuit held that the protections offered under the Antiretaliation Section extend only to individuals who meet the external reporting requirements of the Definitions Section; and the latter section merely describes a set of protected activities for individuals who have already achieved whistleblower status by reporting to the SEC.¹⁰² By reading the Definitions Section as a gateway through which an individual must pass in order to enjoy the protections of the Antiretaliation Section, the Fifth Circuit found no conflict in the statute.¹⁰³ The court relied heavily on the word “whistleblower” in the Antiretaliation Section and maintained that had Congress intended this section to provide protections for all individuals making internal disclosures, it would have used the term “individual” or “employee” rather than “whistleblower.”¹⁰⁴

The Fifth Circuit also rejected the argument that a narrow interpretation of Section 922 would impermissibly render portions of the Antiretaliation Section superfluous.¹⁰⁵ To counter this criticism, the court imagined a hypothetical situation that allowed both sections to come into play without making each other moot. In this hypothetical, an individual would simultaneously report violations internally to his superiors and externally to the SEC.¹⁰⁶ The employee’s manager would only be aware of the internal reporting and would subsequently fire the employee solely in retaliation for that

101. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 624–25 (5th Cir. 2013).

102. *Id.* at 625.

103. *Id.* at 626 (“Conflict would exist between these statutory provisions only if we read the three categories of protected activity as additional definitions of three types of whistleblowers.”).

104. *Id.*; see also *Sullivan v. Stroop*, 496 U.S. 478, 484 (noting that the “normal rule of statutory construction assumes that ‘‘identical words used in different parts of the same act are intended to have the same meaning.’’” (quoting *Sorenson v. Sec’y of Treasury*, 475 U.S. 851, 860 (1986)) (internal quotation marks omitted)).

105. *Asadi*, 720 F.3d at 627.

106. *Id.*

reporting.¹⁰⁷ The Fifth Circuit noted that without the internal reporting protections in the Antiretaliation Section, this hypothetical employee would not be protected because the manager did not base the termination decision on the protected external reporting.¹⁰⁸

To bolster this argument, the court went a step further and suggested that interpreting Section 922 broadly would actually render the SOX *antiretaliation provisions* moot.¹⁰⁹ If Dodd–Frank provided the exact same protections as SOX by protecting internal whistleblowers, and if Dodd–Frank’s incentives were so much stronger, then no employee would ever bring a SOX antiretaliation claim. As a result, Section 806 of SOX would be superfluous. This was a particularly clever argument because it took a major concern voiced by each of the district courts and turned it on its head. In response to the district courts’ arguments that a narrow definition of “whistleblower” would make the Antiretaliation Section superfluous, the Fifth Circuit asserted that a broad interpretation of Section 922 would make the Definitions Section (as well as SOX’s own antiretaliation protections) superfluous.¹¹⁰

Finally, the Fifth Circuit attempted to dispose of the issue of *Chevron* deference by holding that Dodd–Frank unambiguously required individuals to report violations to the SEC in order to qualify for antiretaliation protections. Thus, there was no need to defer to the SEC’s final rule purporting to reconcile the two sections at issue.¹¹¹ The Fifth Circuit also criticized the SEC’s interpretive rule as being inconsistent, noting that “[w]hile 17 C.F.R. § 240.21F-2(b)(1) appears to adopt a broader definition of ‘whistleblower[]’ . . . 17 C.F.R. § 240.21F-9, which governs the procedures for submitting original information to the SEC, explicitly requires that an individual submit information about a possible securities law violation to the SEC.”¹¹² Thus, even if the court had found that the statute was ambiguous, it would not have deferred to the SEC’s interpretation because the interpretation was not reasonable. In such a situation, the court would remain free to adopt its own (narrow) interpretation of Section 922.¹¹³

107. *Id.*

108. *Id.* at 627–28.

109. *Id.* at 628–29 (explaining that when given the choice of either a SOX claim or a Dodd–Frank claim, an individual would likely not raise a SOX claim because Dodd–Frank provides stronger protections and greater incentives).

110. The Fifth Circuit does not further elaborate on this particular argument in the case, but this Note contends that this is a logical reading of it.

111. *Asadi*, 720 F.3d at 630 (holding that not only does the court not *need* to follow the SEC’s interpretation but that “[b]ecause Congress has directly addressed the precise question at issue, we *must* reject the SEC’s expansive interpretation of the term ‘whistleblower’ for purposes of the whistleblower-protection provision” (emphasis added)).

112. *Id.*

113. *See id.* (“The SEC’s inconsistency in defining the term ‘whistleblower’ for purposes of the Dodd–Frank whistleblower-protection provision does not strengthen *Asadi*’s position that the SEC’s interpretation ‘reasonably effectuate[s] Congress’s intent.’” (alteration in original) (quoting *Texas v. United States*, 497 F.3d 491, 506 (5th Cir. 2007))).

The Fifth Circuit is the outlier in its textual and structural analysis of Section 922, and its arguments for the narrow interpretation are not persuasive. To be sure, the first argument—that Congress used the term “whistleblower” rather than “individual” for a reason—does support a narrow interpretation of the section, but this argument does not resolve the section’s overall ambiguity and conflict. The district courts’ main concern—that a narrow interpretation of Section 922 would make the internal whistleblower protections in the Antiretaliation Section superfluous—remains valid because there are no realistic scenarios for those particular protections to apply under a narrow construction of the statute. The Fifth Circuit discusses one such scenario in its opinion, but it has to bend over backwards to conjure a hypothetical that gives meaning to both the Definitions Section and Antiretaliation Section under its narrow interpretation of Section 922.

In the Fifth Circuit’s hypothetical, an employee simultaneously reports internally and externally and is then fired solely based on his internal reporting. In this unlikely scenario, the employee would have to be willing to admit openly to his superiors that a potential violation had taken place, and he would *also* have to disclose secretly this same violation to the SEC. Further, the manager would have to be—and would have to persuade a court that he *was*—unaware of the external reporting,¹¹⁴ even though his employee apparently (and misguidedly) trusted him enough to report the violation internally. Most significantly, the majority of incentives for and benefits of internal whistleblowing—displaying loyalty to one’s company and allowing for quick, efficient, and private resolutions of violations—are absent in this scenario because the employee has also reported to the SEC. Thus, it is hard to imagine what motivations would prompt the employee to make this internal disclosure at all.¹¹⁵ The Fifth Circuit is also unable to point to any concrete examples of such a situation ever occurring.¹¹⁶ Congress certainly did not envision this type of scenario when it drafted Dodd–Frank.

Even if presumed true, the Fifth Circuit’s third argument—that a broad interpretation could render other sections of Dodd–Frank and SOX moot—does not make the district courts’ concerns about the drawbacks of a narrow

114. *Asadi* attempts to legitimize this scenario in a footnote:

Under 17 C.F.R. § 240.21F–9(a), “[t]o be considered a whistleblower . . . , you must submit your information about a possible securities law violation by either of these methods: (1) Online, through the Commission’s Web site . . . ; or (2) By mailing or faxing a Form TCR (Tip, Complaint or Referral) . . . to the SEC Office of the Whistleblower” Regardless of which of these two methods a whistleblower utilizes to submit information to the SEC, the whistleblower’s employer will not necessarily immediately be aware of the disclosure, unless of course, the whistleblower informs her employer that she has made such a disclosure.

Id. at 627 n.10 (alterations in original). The court, however, says nothing about the likelihood of such a scenario *ever* arising.

115. See *supra* notes 10–11, 37–39, and *infra* notes 163–164 and accompanying text for the benefits of internal whistleblowing.

116. See *Asadi*, 720 F.3d at 627–28.

interpretation any less valid.¹¹⁷ It simply demonstrates that both the broad and narrow interpretations of Section 922 threaten to make other laws moot but does not provide any reason (other than the court's far-fetched hypothetical) for accepting one interpretation over the other. If anything, this third argument simply reinforces the idea that the statute is ambiguously drafted, which in turn suggests that the Fifth Circuit should have respected the principle of *Chevron* deference and looked to the SEC's interpretation.¹¹⁸

The Fifth Circuit's final argument—that the SEC's interpretation is inconsistent and thus would fail step two of *Chevron*—is its least persuasive. The court asserts that the SEC's own rules are inconsistent because the SEC maintains that to be considered a whistleblower, individuals must submit information to the SEC.¹¹⁹ But the agency is not being inconsistent here. It is merely providing whistleblowers a route to comply with the requirement of the Definitions Section to report information to the SEC “in a manner established, by rule or regulation, by the Commission.”¹²⁰ This portion of the SEC's rule simply tries to identify the methods that individuals *can* use to become whistleblowers by reporting to the SEC (i.e., external whistleblowers). The rule does not provide that individuals can *only* become whistleblowers by following such methods.

III. COURTS CAN FOLLOW THE SUPREME COURT'S GUIDANCE IN *HERMAN* WITHOUT VIOLATING THE CANONS OF STATUTORY CONSTRUCTION

The six courts that have tackled this issue employed various tools of statutory interpretation to reach their conclusions, but none of them focused on the remedial *purpose* for which Dodd–Frank was enacted. Section III.A will first outline the Supreme Court's holding in *Herman & MacLean v. Huddleston*: remedial statutes should be broadly and flexibly interpreted. Section III.B will then argue that the text and structure of Section 922 permit a broad interpretation under *Herman*. Section III.C will explain that the legislative history of Dodd–Frank does not help clarify Congress's intent regarding the scope of whistleblower protections. Finally, Section III.D will argue that the *Herman* Rule can be used in conjunction with step two of *Chevron* as a justification for finding that the SEC's interpretation of Dodd–Frank was reasonable. This Note concludes that maintaining protections for internal whistleblowers is crucial to the success of Dodd–Frank and

117. Either interpretation could purportedly render another portion of the same statutory scheme superfluous, and “the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.” *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013).

118. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.”).

119. See *supra* note 114 and accompanying text.

120. 15 U.S.C. § 78u-6(a)(6) (2012).

that courts should therefore use a broad and flexible approach in interpreting Section 922—and Dodd–Frank more generally—as long as the text permits such an approach.

A. *Remedial Securities Regulations Should Be Broadly and Flexibly Interpreted*

The history of interpreting remedial statutes dates back to English common law at the time of America’s founding.¹²¹ The general rule (the “*Herman* Rule”) is that remedial statutes should be interpreted broadly and flexibly.¹²² The Supreme Court has referred to this rule as recently as 2002.¹²³ Moreover, various circuit courts continue to employ the rule frequently when interpreting securities regulations.¹²⁴ In *Herman*, the Supreme Court explicitly supported broad constructions of remedial legislation in the context of *securities* regulations: “[W]e have repeatedly recognized that securities laws combating fraud should be construed ‘not technically and restrictively, but flexibly to effectuate [their] remedial purposes.’”¹²⁵ But application of the *Herman* Rule is itself limited by the text of the statute to which it is applied.¹²⁶ Therefore, to determine if the antiretaliation protections in Section 922 Dodd–Frank should be interpreted broadly based on *Herman*, courts should determine if Dodd–Frank is a remedial securities statute and whether the text allows for a broad, remedial interpretation.

In the case of Dodd–Frank’s antiretaliation protections, it is reasonable for courts to follow the *Herman* Rule because Dodd–Frank is a remedial securities regulation. As noted in Part I, Dodd–Frank was enacted following the 2008 financial crisis.¹²⁷ And, perhaps more pointedly, recent case law implies that securities whistleblower protections are indeed remedial regulations. In a 2014 case, *Lawson v. FMR LLC*, the Supreme Court considered a

121. See 1 WILLIAM BLACKSTONE, COMMENTARIES *87 (“There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy . . . [a]nd it is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy.”).

122. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386–87 (1983); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963) (“Congress intended . . . securities legislation ‘enacted for the purpose of avoiding frauds,’ not technically and restrictively, but flexibly to effectuate its remedial purposes.” (footnote omitted)); see also Rudolph H. Heimanson, *Remedial Legislation*, 46 MARQ. L. REV. 216, 218 (1962).

123. *SEC v. Zandford*, 535 U.S. 813, 819 (2002).

124. See, e.g., *Gomes v. Am. Century Cos.*, 710 F.3d 811, 816 (8th Cir. 2013); *Lawson v. FMR LLC*, 670 F.3d 61, 76 (1st Cir. 2012), *rev’d*, 134 S. Ct. 1158 (2014); *SEC v. J.W. Barclay & Co.*, 442 F.3d 834, 840 (3d Cir. 2006).

125. *Herman*, 459 U.S. at 386–87 (1983) (alteration in original) (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963)).

126. *SEC v. Sloan*, 436 U.S. 103, 116 (1978) (“[W]e would not be inclined to read [remedial securities legislation] more broadly than its language and the statutory scheme reasonably permit.”).

127. Recent Legislation, *supra* note 17, at 1829.

matter involving SOX whistleblower protections.¹²⁸ Similar to the courts interpreting Section 922, the Court in *Lawson* addressed which individuals were covered by SOX's whistleblower antiretaliation protections. Specifically, the Court considered whether SOX provides whistleblower protections only for individuals directly employed by a covered (public) company or whether the protections extend to employees of privately held contractors and subcontractors.¹²⁹ The Court ultimately reversed the First Circuit's holding and interpreted the SOX whistleblower protections broadly to cover such contractors.¹³⁰ Throughout the opinion, the Court repeatedly recognized that SOX was designed to remedy the causes that precipitated the financial collapses of institutions like Enron.¹³¹ Even the First Circuit's narrow—and overruled—interpretation recognized SOX's remedial nature and specifically referenced the *Herman* Rule.¹³²

In light of the Court's decision in *Lawson*, then, there are several reasons to suggest that Section 922 is remedial legislation and that courts should therefore follow the *Herman* Rule and consider the section's remedial purpose insofar as the text permits it. First, questions concerning the whistleblower antiretaliation protections under Dodd–Frank are materially similar to the questions addressed in *Lawson*, and the Court in that case felt compelled to address the remedial nature of SOX. Second, Section 922's whistleblower provisions were enacted to improve SOX's whistleblower protections, which were, after all, the subject of the Court's decision in *Lawson*. Third, Dodd–Frank was generally enacted in response to a financial crisis, much like SOX and the Securities Exchange Act. Finally, although the Supreme Court in *Lawson* did not rule on Dodd–Frank's whistleblower protections, the Court did hint that it might prove amenable to a broad interpretation of those provisions as well.¹³³

128. 134 S. Ct. 1158 (2014), *rev'g* 670 F.3d 61 (1st Cir. 2012).

129. *Lawson*, 134 S. Ct. at 1165.

130. *Id.* (“We hold . . . that the provision shelters employees of private contractors and subcontractors, just as it shelters employees of the public company served by the contractors and subcontractors.”).

131. *E.g., id.* at 1162 (“In the Enron scandal that prompted the Sarbanes–Oxley Act . . .”); *id.* at 1168 (“[C]onsider whether a Congress, prompted by the Enron debacle, would exclude from whistleblower protection countless professionals equipped to bring fraud on investors to a halt.”); *id.* at 1169 (“Our textual analysis . . . fits the provision’s purpose. It is common ground that Congress installed whistleblower protection in the Sarbanes–Oxley Act as one means to ward off another Enron debacle.”).

132. *Lawson v. FMR LLC*, 670 F.3d 61, 76 (1st Cir. 2012) (“[T]he Court has stated that ‘securities laws combating fraud should be construed “not technically and restrictively, but flexibly to effectuate [their] remedial purposes.”’” (alteration in original) (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386–87 (1983))), *rev'd*, 134 S. Ct. 1158 (2014).

133. *See Lawson*, 134 S. Ct. at 1175 (“If anything relevant to our inquiry can be gleaned from Dodd–Frank, it is that Congress apparently does not share FMR’s concerns about extending protection comprehensively to corporate whistleblowers.”). Although the Court hinted in dicta that it might limit Dodd–Frank’s antiretaliation protections to external whistleblowers, the Court should consider the guidance in *Herman* and interpret Section 922 broadly. *Id.* (“FMR, we note, somewhat overstates Dodd–Frank’s coverage. . . . Dodd–Frank’s whistleblower provision . . . focuses primarily on reporting to federal authorities.”).

B. *The Text and Structure of Section 922 Are Consistent with a Broad Interpretation and Do Not Limit the Application of the Herman Rule*

Although the *Herman* Rule may be applicable to the antiretaliation provisions in Dodd–Frank, the analysis cannot end with a simple inquiry into whether Dodd–Frank’s provisions are suitably remedial. The *Herman* Rule alone cannot rewrite a statute. As the Supreme Court noted, “The broad remedial goals of [a securities law] are insufficient justification for interpreting a specific provision “more broadly than its language and the statutory scheme reasonably permit.””¹³⁴ Even though a remedial purpose is both indicative of congressional intent and can set the stage for broad interpretations of Section 922, courts must ultimately look to the language of the section to determine how broad of an interpretation may be reasonable.

Two basic maxims of textual statutory construction are particularly apt for interpreting the provisions at issue. First, when interpreting a statute, the actual language of the text should be the starting place. Second, language should generally be interpreted according to its plain or ordinary meaning¹³⁵—although the meaning of language will always depend on its context.¹³⁶

1. *The Text and Structure of Section 922 Reasonably Support a Broad Interpretation*

First, for courts even to consider the *Herman* Rule in this situation, a broad interpretation must be reasonable based on the text of Section 922. In Section 922, the Definitions Section defines a whistleblower as a covered individual who reports a potential violation to the SEC.¹³⁷ Thus, when read in isolation, the plain text of the Definitions Section appears to limit whistleblowers to individuals who report directly to the SEC. The Antiretaliation Section, however, protects whistleblowers who provide information directly to the SEC as well as those whistleblowers who make disclosures that are “required or protected” under the Securities Exchange Act, under any law, rule, or regulation within the SEC’s jurisdiction, and under SOX.¹³⁸ And SOX protects whistleblowing disclosures that are made

134. *Pinter v. Dahl*, 486 U.S. 622, 653 (1988) (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1978)).

135. *E.g.*, *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” (quoting *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) (internal quotation marks omitted))); *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (commenting that usually “the plain language of the statute expresses congressional intent”); *People v. Rissley*, 795 N.E.2d 174, 180 (Ill. 2003) (“[T]he language of the statute is the best indication of the legislative intent.”).

136. *Bailey v. United States*, 516 U.S. 137, 145 (1995).

137. 15 U.S.C. § 78u-6(a)(6) (2012).

138. *Id.* §§ 78u-6(h)(1)(A)(i)–(iii).

internally. Consequently, within the broader *context of the statute as a whole*, it is far less clear who qualifies as a Dodd–Frank whistleblower.

Of the six courts that have interpreted the scope of “whistleblower” under this statute, three district courts found a textual basis for a broad interpretation, two district courts balked at the conflict and deferred to the SEC’s interpretation, and the one circuit court found no conflict and held that there was a textual basis for a narrow interpretation.¹³⁹

The courts in *Egan*, *Nollner*, and *Genberg* based their reasoning primarily on the text and structure of Section 922. Each of these courts relied on the logic of *TRW Inc. v. Andrews*, where the Supreme Court held that “a statute ought, upon the whole . . . be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”¹⁴⁰ These courts found that defining “whistleblower” solely using the Definitions Section would invalidate substantial portions of the Antiretaliation Section,¹⁴¹ and therefore they all interpreted the section broadly. These courts’ approaches support the idea that the text and structure of Section 922 are flexible and thus that the courts could have applied the *Herman* Rule here.

2. Courts That Find the Text and Structure of Section 922 Ambiguous Can Defer to the SEC’s Interpretation

It is also reasonable to view the antiretaliation provisions as flexible under an agency-deference approach to statutory interpretation. In *Kramer* and *Murray*, the district courts found a clear conflict in the text of Section 922.¹⁴² *Murray* specifically held that both broad and narrow constructions of

139. See *supra* Part II. The defendants in *Kramer* offered a fourth interpretation, but neither the SEC nor any of the courts that have ruled on this issue adopt or even address this ultranarrow interpretation. See *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 U.S. Dist. LEXIS 136939, at *8–9 (D. Conn. Sept. 25, 2012) (“Trans-Lux argues that the retaliation provision applies only to those individuals who are both (a) a whistleblower under section 78u-6(a)(6), and (b) have engaged in one of the protected activities listed in section 78u-6(h)(1)(A).”).

140. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) (internal quotation marks omitted); see also *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106 (D. Colo. 2013); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 994 (M.D. Tenn. 2012); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 U.S. Dist. LEXIS 47713, at *12–13 (S.D.N.Y. May 4), *dismissed by* No. 10 Civ. 8202 (LBS), 2011 U.S. Dist. LEXIS 103416 (S.D.N.Y. Sept. 12, 2011).

141. *Genberg*, 935 F. Supp. 2d at 1106 (“[T]he defendants’ interpretation of [Dodd–Frank] would render § 78u-6(h)(1)(A)(iii) inoperable and moot. . . . § 78u-6(h)(1)(A)(iii) should be interpreted as an exception to the whistleblower definition found in § 78u-6(a)(6).”); *Nollner*, 852 F. Supp. 2d at 994 (“[T]he court must read part (iii) of the anti-retaliation provisions in conjunction with the definition of whistleblower.”); *Egan*, 2011 U.S. Dist. LEXIS 47713, at *12 (“The contradictory provisions of the Dodd–Frank Act are best harmonized by reading 15 U.S.C. § 78u-6(h)(1)(A)(iii)’s protection of certain whistleblower disclosures not requiring reporting to the SEC as a narrow exception to 15 U.S.C. § 78u-6(a)(6)’s definition of a whistleblower as one who reports to the SEC.”).

142. See *supra* Section II.B.

“whistleblower” were reasonable but that the very existence of these competing interpretations demonstrated that Section 922 was ambiguous.¹⁴³ *Kramer* found that it was ambiguous whether Congress intended for “whistleblower” to be narrowly construed since a narrow reading was inconsistent with Dodd–Frank’s general purpose.¹⁴⁴ That both courts deemed the statute ambiguous sufficed to persuade them to move to step two of *Chevron*, which entailed an assessment of whether the SEC’s interpretation of “whistleblower” was reasonable.¹⁴⁵ The courts did in fact conclude that the SEC’s regulations represented a reasonable interpretation of the statute, and therefore they deferred to the SEC’s view that the whistleblower provisions protected both internally and externally reporting individuals.¹⁴⁶

Importantly, neither deference to the SEC nor interpretations of the text and structure of Section 922 would have barred any of these courts from applying the *Herman* Rule to Dodd–Frank’s antiretaliation provisions. In an agency-deference statutory approach, the *Herman* Rule would be useful at step two of *Chevron*. If the respective agency chooses to interpret an ambiguous securities regulation broadly and flexibly, the *Herman* Rule would support the argument that the agency’s interpretation is reasonable. And under a textual or structural approach, the *Herman* Rule is consistent with the broad holdings of the district courts.¹⁴⁷ Of course, the Fifth Circuit’s narrow construction of Section 922 *would* bar the *Herman* Rule, but, as discussed above,¹⁴⁸ the court’s reasoning is unpersuasive.

A statutory construction of Section 922 does not necessarily end with the provision’s text and structure, however. If the ambiguity can be resolved by utilizing other tools of statutory construction, then there is no need to defer to the SEC’s interpretation.¹⁴⁹ In addition to looking at the language and structure of Section 922, courts should therefore consider the legislative intent behind the statute at issue.¹⁵⁰

143. *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914 (JMF), 2013 U.S. Dist. LEXIS 71945, at *13–14 (S.D.N.Y. May 21, 2013).

144. *See Kramer*, 2012 U.S. Dist. LEXIS 136939, at *10–11.

145. *See Murray*, 2013 U.S. Dist. LEXIS 71945, at *15; *Kramer*, 2012 U.S. Dist. LEXIS 136939, at *12.

146. *See Murray*, 2013 U.S. Dist. LEXIS 71945, at *20–21 (“[T]his Court defers to the SEC’s interpretation.”); *Kramer*, 2012 U.S. Dist. LEXIS 136939, at *13 (“The SEC’s rule is a permissible construction of the Dodd-Frank Act, and, accordingly, I must follow it.”).

147. *See supra* Section II.B.

148. *See supra* notes 114–120 and accompanying text.

149. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984) (“[Courts] should not disturb [an agency’s interpretation] unless it appears from the statute *or its legislative history* that the accommodation is not one that Congress would have sanctioned.” (emphasis added) (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961))).

150. *PDK Labs. Inc. v. U.S. DEA*, 362 F.3d 786, 792 (D.C. Cir. 2004).

C. *The Legislative History of Dodd–Frank Provides Little Guidance on How Courts Should Interpret Section 922*

When interpreting a statute, courts should also consider the legislative intent behind a provision.¹⁵¹ If the legislative history clearly reveals a preference that can resolve the ambiguity in Section 922, then the courts need not defer to the SEC. Thus, to determine “whether Congress has directly spoken to the precise question at issue,”¹⁵² or if, instead, there is sufficient ambiguity to move to step two of *Chevron*, courts should investigate the legislative history of Dodd–Frank. Unfortunately, the Act’s legislative history is not particularly illuminating regarding the scope of whistleblower antiretaliation protections.¹⁵³

There was some legislative debate, particularly in the Senate, addressing both whistleblower protections in general and the specific antiretaliation measures at issue, but Congress said comparatively little about internal versus external whistleblowers. During the days before the Senate passed Dodd–Frank, several senators made floor speeches specifically addressing the whistleblower protections in the Act. Leahy expressed his support for the whistleblower protections,¹⁵⁴ and Cardin similarly voiced his appreciation for the antiretaliation provisions.¹⁵⁵ Through these statements, the Senate indicated its support for the whistleblower protections in general and for the protections in the Antiretaliation Section more specifically.¹⁵⁶ Yet there is no mention of the specific issue of internal versus external whistleblowing.

On the same day that Senators Leahy and Akaka made their statements, Senator Reed noted as follows: “I also support the establishment of a program to reward whistleblowers when the SEC brings significant enforcement actions based upon original information provided by the whistleblower, and I look forward to the SEC rules that will detail the framework for this program.”¹⁵⁷ Unfortunately, at best, this demonstrates Reed’s support for external whistleblowing, without giving any indication about his thoughts on the overall breadth of Section 922 and whether internal whistleblowing would be permitted. Because the legislative history of Dodd–Frank does not resolve the ambiguity that the *Kramer* and *Murray* courts found in the text and structure of the whistleblower protection provisions, these courts were justified in proceeding to *Chevron* step two. And had the Fifth Circuit found

151. *Chevron*, 467 U.S. at 842–43.

152. *Id.* at 842.

153. *Egan v. TradingScreen, Inc.*, 2011 U.S. Dist. LEXIS 47713, at *11 (S.D.N.Y. May 4) (“The legislative history of the Act provides little evidence of Congress’s purpose.”), *dismissed by* No. 10 Civ. 8202 (LBS), 2011 U.S. Dist. LEXIS 103416 (S.D.N.Y. Sept. 12, 2011).

154. *See supra* note 59.

155. *See supra* note 58.

156. *See* 156 CONG. REC. S5929 (daily ed. July 15, 2010) (statement of Sen. Chris Dodd) (“Congress intends that the SEC make awards that are sufficiently robust to motivate potential whistleblowers to share their information and to overcome the fear of risk of the loss of their positions.”).

157. *Id.* at S5916 (statement of Sen. Jack Reed).

ambiguity, it too would have been equally justified in moving to step two of this test.

D. *Courts That Find Conflict and Ambiguity in Section 922 Should Defer to the SEC's Interpretation*

As mentioned in Part II, the first step of *Chevron* entails determining whether the statute or provision at issue is ambiguous. Courts will typically use basic tools of statutory construction (i.e., the text, structure, purpose, and legislative history of a statute) to determine whether it is ambiguous.¹⁵⁸ Because neither the text, structure, nor legislative history of Section 922 was sufficient to resolve the issue for the *Kramer* and *Murray* courts, they appropriately moved to step two of the test to determine whether the agency's interpretation was permissible. And it is at this step of *Chevron* that courts can strengthen and legitimize their holdings by citing the *Herman* Rule.

The *Kramer* and *Murray* courts both determined that the SEC's interpretation was reasonable, although they reached this conclusion for different reasons. The *Kramer* court referred to the purpose of Dodd–Frank, but it did so briefly, superficially, and without any explanation for why a purpose-based interpretation is justified: “[T]he Dodd–Frank Act appears to have been intended to expand upon the protections of Sarbanes–Oxley.”¹⁵⁹ If the court had followed up by citing *Herman*, or even the basic principle of *Herman* that remedial statutes should be interpreted flexibly, it would have made a much more compelling argument.

Murray relied on the holdings of prior courts to find that the SEC's interpretation was in fact reasonable: “[I]t compels the conclusion, at step two of the *Chevron* [test], that the SEC's interpretation is a reasonable one. After all, its rule is consistent with the interpretation of the statutory provisions put forth by *Egan*, *Nollner*, *Kramer*, and *Genberg*”¹⁶⁰ *Murray* noted that its initial holding—that there were two permissible but conflicting interpretations of the statute—had two implications. First, it was appropriate to follow *Chevron* and defer to the SEC's interpretation. Second, because the SEC's interpretation comported with one of the permissible interpretations (the district courts' broad interpretation),¹⁶¹ the SEC's interpretation was reasonable. *Murray* held that the broad interpretation of Section 922 is reasonable in order to meet the first prong of *Chevron* because it conflicts with

158. *Lee v. Holder*, 701 F.3d 931, 936 (2d Cir. 2012) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (internal quotation marks omitted)).

159. *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 U.S. Dist. LEXIS 136939, at *1, *12 (D. Conn. Sept. 25, 2012).

160. *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914 (JMF), 2013 U.S. Dist. LEXIS 71945, at *15 (S.D.N.Y. May 21, 2013).

161. *Id.* at *13–14 (“No doubt this [broad] reading of the two statutory provisions is permissible, but as *Egan*, *Nollner*, *Kramer*, and *Genberg* make clear, it is by no means mandatory.”).

the narrow interpretation and thus is ambiguous. The court then relied on that same finding to meet the second prong. Thus, *Murray* ultimately justified the SEC's interpretation by pointing to the fact that the interpretation is consistent with the *conclusions* of previous courts. By explaining that its holding was consistent with *Herman*, *Murray* could have bolstered its conclusion that the SEC's interpretation was reasonable and thus presented an independent basis for meeting the second prong of *Chevron*.

The *Kramer* and *Murray* courts' deference to the SEC was appropriate because—even after applying traditional tools of statutory construction—there was ambiguity in the antiretaliation provisions. But the courts' holdings would have been more convincing, and better grounded in precedent, if they had found an independent basis for the SEC's interpretation. This Note argues that the *Herman* Rule can be applied in this situation to provide a sufficient, and precedentially strong, basis for a broad interpretation of “whistleblower.” The holdings in *Kramer* and *Murray* only further highlight the flexibility in the antiretaliation provisions while demonstrating that the tools of statutory construction are insufficient to resolve the ambiguity that arises from this flexibility. Therefore, the *Herman* Rule serves as an appropriate tool of construction, and lower courts should defer to the Supreme Court's guidance that remedial statutes be interpreted as broadly as the text and structure reasonably permit.

CONCLUSION

The complicated text and structure of Section 922 make determining the scope of Dodd–Frank whistleblower protections a challenging task for courts. Fortunately, courts can turn to the *Herman* Rule to support a broad interpretation. Because the text and structure of Section 922 do not bar application of *Herman*, and because the reasonableness of the SEC's interpretation can be validated by *Herman*, courts should use this rule to justify a broad interpretation of Dodd–Frank regardless of which method of statutory interpretation they employ.

A robust and effective corporate internal reporting system provides a variety of benefits to companies, regulators, and the general public. (And most initial whistleblowing is internal.)¹⁶² Strong protections for internal reporting would allow and encourage people with specialized knowledge or expertise to find potential violations, report them, and subsequently remedy them quickly and effectively.

If the Supreme Court were to adopt the Fifth Circuit's narrow interpretation of Section 922, potential whistleblowers might skip internal reporting and go directly to the SEC—or at least do both simultaneously—which

162. See Marcia Parmerlee Miceli & Janet P. Near, *The Relationships Among Beliefs, Organizational Position, and Whistle-Blowing Status: A Discriminant Analysis*, 27 ACAD. MGMT. J. 687, 700–01 (1984).

would still produce all of the drawbacks that come with external reporting.¹⁶³ Interpretations that promote internal reporting would therefore be more consistent with Dodd–Frank’s remedial purpose. If internal reporting is not protected and encouraged, companies could lose out on the benefits of fixing violations internally, regulators could be overwhelmed by an influx of complaints, and investors might lose confidence either in the financial sector due to news of repeated SEC sanctions or in the regulatory system itself due to the SEC’s inability effectively to punish and deter securities violations.¹⁶⁴

If the Court does take up this issue in the future, it should use *Herman* either to directly interpret Section 922 in a broad fashion or to find that the SEC’s interpretation is reasonable under *Chevron* and hence defer to the SEC—an institution far better equipped than the Court to tackle the complex issue of whistleblower antiretaliation protections.

163. Joseph M. McLaughlin, *Dodd–Frank and Whistleblower Protection: Who Qualifies?*, N.Y. L.J., Aug. 8, 2013, at 5.

164. Recent Legislation, *supra* note 17, at 1835 (“[P]otential circumvention of internal reporting could have vast costs and indeed could undermine the very goal that section 922 was enacted to promote—the effective and efficient detection of securities law violations.”).

